

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the proposed)	NOTICE OF PUBLIC HEARING ON
amendment of ARM 2.6.202, 2.6.203,)	PROPOSED AMENDMENT
2.6.209)	
)	

TO: All Concerned Persons

1. On <insert date>, 2012, a public hearing will be held in Room 160 of the Mitchell Building, 125 N. Roberts St., Helena, Montana to consider the proposed amendment of the above-stated rules.

2. The Department of Administration (Department) will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department no later than 5:00 p.m. on <insert date>, to advise us of the nature of the accommodation that you need. Please contact Brett Dahl, Risk Management and Tort Defense Division, P.O. Box 200____, Helena, Montana 59620-0____; telephone (406) 444-3687; TDD (406) 444-1421; facsimile (406) _____; or e-mail to bdahl@mt.gov.

3. The rules proposed to be amended provide as follows:

2.6.202 DEFINITIONS As used in this sub-chapter, the following definitions apply:

(1) "Measurable amount of alcohol" means the alcohol concentration of the person's breath or blood is .02 or more.

(4)(2) "State" as defined in [2-9-101, MCA](#).

(2)(3) "State employee" as defined in [2-9-101, MCA](#).

(3)(4) "State vehicle" means a motor vehicle, semi-trailer, snowplow, or other vehicle designed for travel on public roads that is subject to motor vehicle registration, including any machinery or apparatus attached to the vehicle. The term includes the following:

(a) a "leased vehicle" obtained by the state through an open-ended lease or lease with an option to buy contract;

(b) a "loaned vehicle" provided to the state as a gratuity;

(c) an "owned vehicle" to which the state has title; and

(d) a "rented vehicle" rented by the state for a fee, typically for short-term use in Montana or for out-of-state travel.

AUTH: 2-17-424, MCA

IMP: 2-9-201, 2-9-305, 2-17-424, MCA

STATEMENT OF REASONABLE NECESSITY: State employees operate and drive a variety of trailers in addition to semi-trailers. This change, therefore, reflects this fact. The Department considered another alternative to this proposed amendment. One alternative was to list the trailers that state employees currently operate and drive. The Department rejected this alternative because given that the type of trailers employees will operate and drive will change over time, the Department determined it would not be a productive use of resources to regularly amend the rule.

The Statement of Reasonable Necessity for the definition of "Measurable amount of alcohol" is included within the Statement of Reasonable Necessity for the proposed amendments to Rule 2.6.209 below.

2.6.203 AUTHORIZED DRIVERS AND USES (1) Except as otherwise provided in this rule, the following individuals may operate a state vehicle if the driver possesses a valid driver's license appropriate to the type of vehicle to be driven, meets driver requirements set out in ARM 2.6.205, and the uses are as provided below:

- (a) a state employee to conduct business on behalf of the state;
- (b) a state employee in travel status to obtain food and lodging and to respond to medical emergency situations;
- (c) a state employee required to conduct state business to obtain items needed while in travel status;
- (d) a state employee may park a state vehicle overnight at the employee's residence if the employee must begin travel the next day or if the employee is subject to emergency response, on-call, or other off-shift duty associated with state employment;
- (e) a state employee required to stay overnight at a location other than the employee's established work location during nonwork time to drive to a cultural, recreational, or leisure activity or to conduct other personal business, if the activity is within 30 miles of the employee's lodging;
- (f) a non-state employee enrolled and registered as a student at a university of the state to conduct university business;
- (g) a non-state employee to aid or assist a disabled state employee if the aide has completed the risk management and tort defense division's (RMTD) vehicle use agreement and obtained authorization from the agency head or designee prior to the use;
- (h) a non-state employee to assist a state employee or other individual during a medical emergency for transportation and related purposes. Prior approval is not required;
- ~~(i) a non-state employee who is an independent contractor or an employee of a temporary employment agency contracting with the state with prior approval from the agency head when a state employee is not available to operate the vehicle. The contractor must complete the RMTD's vehicle use agreement. The agreement must be~~

signed by the agency head and presented to the motor pool or affected state agency prior to the use; and

(j)-(i) a non-state employee accompanying a state employee on official state business where the state employee becomes ill, fatigued, or is otherwise rendered physically or mentally incapable of driving and/or a compelling state interest is served by allowing the non-state employee to drive. Prior approval is not required; and
(i) an inmate of a state prison who must operate a state vehicle to fulfill job duties for a position with Montana Correctional Enterprises or a state prison, and who is approved by the appropriate division as outlined in Montana State Prison/Montana Women's Prison/Montana Correctional Enterprises Procedure. If an inmate who is allowed to drive on Department of Corrections' property under this section does not have a valid driver's license, the inmate may drive a state vehicle if the inmate has a valid facility driving permit, is timely paying fines, if any, associated with the inmate's loss of a driver's license, and is working toward obtaining a valid State of Montana driver's license.

(2) Any exception to the authorized drivers and uses requires the prior written approval of the Risk Management and Tort Defense Division.

AUTH: 2-17-424, MCA

IMP: 2-9-201, 2-9-305, 2-17-424, MCA

STATEMENT OF REASONABLE NECESSITY: The Department proposes to eliminate the rule allowing operation of state vehicles by independent contractors for several reasons. The Montana Tort Claims Act, 2-9-101, MCA, et seq. applies to claims filed against a governmental entity (the state and its political subdivisions) for money damages only because of personal injury or property damaged caused by a negligent or wrongful act or omission committed by any employee of the governmental entity while acting within the scope of employment. The term does not apply to an independent contractor under contract to a governmental entity.

The Department initially allowed the use of state vehicles by independent contractors in an attempt to address the infrequent situation where a state employee was unavailable to operate the vehicle. However, experience has shown that the use has become more commonplace, exposing the State to greater potential liability. The Department believes that eliminating this use of State vehicles by independent contractors will establish consistency for all state agencies and reduce the State's potential liability risks.

An alternative to the Department's proposed approach is that agencies could seek approval from the Risk Management and Tort Defense Division allowing independent contractors to operate state vehicles. The Department rejected this approach because the division does not have the personnel to review these requests, and this approach does not address the increased potential liability issue.

Another alternative is that each agency would have a quota of uses of a state vehicle by an independent contractor. Once the quota was reached, the agency could not allow a contractor's to operate a state vehicle. While this approach would give the agencies some flexibility, it too does not address the potential liability issue.

2.6.209 ALCOHOL AND DRUGS (1) No person ~~under the influence of~~ may drive a vehicle for state business who has a measurable amount of alcohol, illegal drugs, or ~~improperly used prescription drugs in their body may drive a vehicle for state business.~~

(2) No person may drive a vehicle for state business ~~under the influence of~~ who has taken any legally prescribed drug if that drug affects the person's ability to safely operate the vehicle.

(3) No person may have an alcoholic beverage container in the passenger compartment of a state-owned, leased, or loaned vehicle.

AUTH: 2-17-424, MCA

IMP: 2-9-201, 2-9-305, 2-17-424, MCA

STATEMENT OF REASONABLE NECESSITY: Montana law defines “under the influence of alcohol” to mean that as a result of taking into the body alcohol, drugs, or any combination of alcohol and drugs, a person’s ability to safely operate a vehicle has been diminished. 61-8-401(3)(a), MCA. Under this definition, a person could consume alcohol, drugs, or a combination of the two, and still operate a vehicle so long as done so safely. The department, however, believes that no state employee should operate a vehicle after consuming (1) any measurable amount of alcohol or drugs or improperly used prescription drugs or (2) properly used prescription drugs if such use affects the person’s ability to safely operate the vehicle.

The Department proposes using the standard of “measurable amount of alcohol” to replace the standard of “under the influence.” The proposed definition of “measurable amount of alcohol” is an alcohol concentration of the person’s breath or blood of .02 or more. This is the standard Montana (61-8-410(1), MCA) and many other states have adopted for purposes of “zero tolerance” of underage drinking and driving. Given this standard, the Department saw no need to craft a different standard.